No. _____

In The

SUPREME COURT OF THE UNITED STATES

CHRISTOPHER VENTRICE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari
To The Court Of Appeals
For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

CHRISTOPHER VENTRICE
2680 301 South
Jesup, GA 31599

Petitioner

QUESTIONS PRESENTED

I. Whether petitioner's appellate counsel's failure to file petition for writ of certiorari on direct appeal, raising therein his preserved *Apprendi* based claims, after (1) appellate counsel agreed to file said petition in the Supreme Court, and (2) certiorari was granted in *Blakely v. Washington*, 530 U.S. 296 (2004), constituted ineffective assistance of counsel, entitling petitioner to reinstatement of his statutory right to file petition for writ of certiorari in the Supreme Court?

II. Whether petitioner's appellate counsel's failure to file petition for rehearing on direct appeal after (1) Eleventh Circuit denied his preserved *Apprendi* based claims, (2) appellate counsel agreed to file said petition and obtained an extension of time to file same, and (3) certiorari was granted by the Supreme Court in *Blakely v. Washington*, 530 U.S. 296 (2004), constituted ineffective assistance of counsel, entitling petitioner to reinstatement of his statutory right to petition for rehearing before the Eleventh Circuit?

BEST AVAILABLE COPY

III. Whether petitioner's loss of his statutory right to file petition for rehearing on direct appeal in the Eleventh Circuit due to his appellate counsel's failure to file petition for rehearing after counsel obtained an extension of time to file same constituted a substantial showing of a denial of a constitutional right for purposes of issuance of a certificate of appealability?

IV. Whether petitioner's loss of his statutory right to file petition for writ of certiorari on direct appeal in the Supreme Court due to his appellate counsel's failure to file petition for writ of certiorari on direct appeal, after agreeing to file same in the first instance, constituted a substantial showing of a denial of a constitutional right for purposes of issuance of a certificate of appealability?

V. Whether the Eleventh Circuit erred in holding petitioner's appellate counsel's failure to file the petition for rehearing in the Eleventh Circuit and/or petition for writ of certiorari in the Supreme Court did not constitute a substantial showing of a denial of a constitutional right?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED.....i

TABLE OF CONTENTS.....iii

TABLE OF AUTHORITIES.....v

OPINIONS BELOW.....1

JURISDICTION.....2

CONSTITUTIONAL & STATUTORY PROVISIONS INVOLVED.....3

STATEMENT OF CASE.....3

I. Procedural History.....4

II. Facts.....6

REASONS FOR GRANTING PETITION.....10

CONCLUSION.....23

APPENDIX

Appendix A: Order by Eleventh Circuit, two judge panel denying motion for reconsideration of one-judge panel's order denying application for a Certificate of Appealability ("COA"), dated February 22, 2007.....App.1

Appendix B: Order by Eleventh Circuit, one judge panel, denying Petitioner's application for a certificate of appealability, dated January 17, 2007.....App. 4

Appendix C: Order by District Court adopting the Magistrate Judge's Report & Recommendation (R & R) .....App. 6

Appendix D: Order by District Court denying Appellant's application for a COA.....App. 9

Appendix E: Report & Recommendation by District Court denying Appellant's § 2255 habeas petition.....App. 12

TABLE OF AUTHORITIES

Page

SUPREME COURT CASES:

Apprendi v. New Jersey, 530 U.S. 466 (2000) . . ..passim

Blakely v. Washington,
542 U.S. 296 (2004).....6, 8, 18, 21, 22

Boykin v. Alabama, 395 U.S. 238 (1969) 15

Johnson v. Zerbst, 304 U.S. 458 (1938).....15

Jones v. Barnes,
463 U.S. 745, 103 S.Ct. 3308 (1983).....15

Miller-El v. Cockrell, 537 U.S. 322 (2003).....12, 13

Pequero v. United States, 526 U.S. 23 (1999).....20

Roe v. Flores-Ortega,
528 U.S. 470, 120 S.Ct. 1029 (2000).....11, 20

Steele v. Kehoe, 747 So.2d 931 (Fla. 1999).....18

TABLE OF AUTHORITIES – Continued

Page

COURT OF APPEAL CASES:

Cox v. United States,
294 F.3d 959 (8th Cir. 2002).....17, 18, 19

Holloway v. United States,
960 F.2d 1348 (8th Cir. 1992).....12

In Re Reed, 161 F.3d 1311 (11th Cir. 1998).....15

Morales v. United States,
143 F.3d 94 (2nd Cir. 1998).....18

Pressley v. Wainwright,
540 F.2d 818 (5th Cir. 1976).....20

United States v. Mohammed,
135 Fed. Appx. 363 2005 U.S. App. LEXIS
11577 (11th Cir.).....21, 22

TABLE OF AUTHORITIES – Continued

Page

DISTRICT COURT CASES:

Evans v. United States,
2006 U.S. Dist. LEXIS 49516, 2006 WL
1300672 at *5 (E.D. Mo. May 8, 2006).....12

Martinez v. United States, 2006 U.S. Dist. LEXIS 45211
(Dist. S.D. - decided July 3, 2006).....17

Perez v. Department of Corrections,
227 F.Supp.2d 1298 (S.D. Fla. 2002).....19, 21

OTHER STATUTES & AUTHORITIES

U.S. Constitution: Fifth Amendment.....3

U.S. Constitution: Sixth Amendment.....4

18 U.S.C. § 924(c)(1).....4

28 U.S.C. § 846.....4

28 U.S.C. § 1254(1).....2

28 U.S.C. § 2255.....2, 11, 12, 17

TABLE OF AUTHORITIES – Continued

Page

28 U.S.C.A. § 2253 (c)(2)(West 2003).....12, 13

PETITION FOR WRIT OF CERTIORARI

The Petitioner, CHRISTOPHER VENTRICE ("Mr. Ventrice") respectfully prays for a writ of certiorari to review and reverse the judgment of the United States Court of Appeals for the Eleventh Circuit entered in the above referenced matter on February 22, 2007.

OPINIONS BELOW

The unpublished opinion of the Eleventh Circuit Court of Appeals (two-judge panel) denying Mr. Ventrice's motion for reconsideration of one-judge panel's order denying application for a Certificate of Appealability ("COA") is reproduced in *Appendix A* hereto. The unpublished opinion of the one-judge panel denying the application for a COA is reproduced in *Appendix B* hereto. The district court's judgment and order adopting the Magistrate Judge's Report & Recommendation (R&R) denying Mr. Ventrice's motion

to vacate, set aside or correct his conviction and sentence pursuant to Title 28 U.S.C. § 2255 ("section 2255 habeas petition") is reproduced in *Appendix C* hereto. The district court's order denying Mr. Ventrice's application for a COA is reproduced in *Appendix D*. The Magistrate Judge's R&R denying Mr. Ventrice's section 2255 habeas petition is reproduced in *Appendix E* hereto.

JURISDICTION

The Court's jurisdiction is invoked pursuant to Title 28 U.S.C. § 1254(1). This timely petition presents this Court with a serious constitutional question as well as a conflict with prior decisions of this Court as more fully presented below. The questions to be resolved center around whether an appellate attorney's failure to file a final appeal on direct review or otherwise exhaust direct appeal rights to this Court, after being instructed to do so by his client, a criminal defendant, and agreeing to do so, constituted an unjustified waiver of a criminal

defendant's statutory rights, rendering counsel "ineffective" for purposes of the Fifth and Sixth Amendment under the U.S. Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONSTITUTION: FIFTH AMENDMENT

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, . . .; nor shall any person be subject for the same offense twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONSTITUTION: SIXTH AMENDMENT

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, . . ., and to have the Assistance of Counsel for his defense.

STATEMENT OF THE CASE

I. Procedural History.

On August 17, 1999, the government indicted Mr. Ventrice for violating the federal drug conspiracy statute, Title 21 U.S.C. § 846, and the federal gun statute, Title 18 U.S.C. § 924(c)(1). The drug count charged Mr. Ventrice with conspiring to possess a "detectable amount" of cocaine. On April 25, 2000, at the conclusion of a trial by jury, Mr. Ventrice was convicted of both counts under the indictment. On

December 14, 2000, the district court below sentenced Mr. Ventrice to ten (10) months imprisonment under the drug count, and sixty (60) months imprisonment under the gun count to run consecutive to the 10-month drug sentence. The Eleventh Circuit affirmed Mr. Ventrice's conviction, however, reversed his 10-month drug sentence, holding that *Apprendi v. New Jersey*, 530 U.S. 466 (2000) did not apply to his case. On remand, the district court below imposed 120-month drug sentence and reimposed the 60-month gun sentence, to run consecutive to the drug sentence. Following re-sentencing, the Eleventh Circuit affirmed the district court's judgment.

In 2005, Mr. Ventrice filed his section 2255 habeas petition, raising ineffective assistance of counsel claims. On December 15, 2005, the Magistrate Judge entered her R&R denying Mr. Ventrice's section 2255 habeas petition. *Appendix E*. The district court adopted the R&R in its entirety, and entered a final order denying the habeas petition. *Appendix C*. The district

court denied Mr. Ventrice's application for a COA. *Appendix D*. On appeal, the Eleventh Circuit, by a one-judge panel, denied Mr. Ventrice's renewed application for a COA. *Appendix B*. The Eleventh Circuit, by a two-judge panel, denied Mr. Ventrice's motion for reconsideration of the one-judge panel's denial of a COA. *Appendix A*. The instant petition followed. Mr. Ventrice is currently serving his federal sentence at FCI Jesup.

II. Statement of Facts.

During the pendency of Mr. Ventrice's second direct appeal, this Court granted certiorari in *Blakely v. Washington*, 530 U.S. 296 (2004) on October 23, 2003. News of the Blakely case and its potential implications on the federal Sentencing Guidelines spread like wild fire throughout the criminal law circles. Trial and appellate attorneys were preserving their clients' *Apprendi* based claims throughout the criminal proceedings. In fact, this Court experienced an influx of

petitions filed by attorneys and pro se defendants, seeking review of the denial of their *Apprendi* claims.

On March 10, 2004, the Eleventh Circuit affirmed Mr. Ventrice's drug sentence by an unpublished opinion. The Eleventh Circuit held that *Apprendi* was inapplicable and that the district court did not err in applying a preponderance of evidence standard because Mr. Ventrice was re-sentenced within the statutory range. The Eleventh Circuit further found the district court below did not clearly err in attributing five to fifteen kilograms of cocaine to Mr. Ventrice without individualized factual findings. Mr. Ventrice's appellate counsel, Rhonda Anderson, determined to seek a petition for rehearing en banc, moved the Eleventh Circuit to enlarge the time to file Mr. Ventrice's petition for rehearing, which the appellate court granted. Mr. Ventrice's counsel informed Mr. Ventrice that she was going to file a petition for rehearing en banc. She told Mr. Ventrice in the event the petition for rehearing was denied, she was going to file a petition for writ of

certiorari in this Court in light of the *Blakely* case. However, due to personal problems, family issues and relocation of her law firm, Attorney Anderson not only failed to file the petition for rehearing, but, more importantly, the petition for writ of certiorari in this Court. When Mr. Ventrice finally reached Attorney Anderson, he learned of her omissions and errors. Attorney Anderson opined that she would correct her errors by the filing of a petition to recall the Eleventh Circuit's mandate, both in the appellate court below and this Court, should it be denied. The petition to recall the mandate was denied by the appellate court below and this Court.

In the habeas case below, Mr. Ventrice claimed, among other things, his appellate counsel rendered ineffective assistance by failing to file the petition for rehearing in the Eleventh Circuit as well as the petition for writ of certiorari in this Court. He claimed his appellate attorney's omissions and errors on appeal constituted an unjustified waiver of his statutory right to

seek review by the Eleventh Circuit (on the petition for rehearing) and this Court (on the petition for writ of certiorari). The district court below, by adopting the Magistrate Judge's R&R, held:

> Simply stated, the movant's argument "proves too much." Appellate lawyers cannot be held responsible for predicting landmark decisions and should not be encouraged to file petitions for review for the purpose of "buying time." Ms. Anderson was not required to file a petition for rehearing after the Eleventh Circuit had rejected the movant's sentencing arguments for the second time, based on the possibility that the United States Supreme Court might generate a helpful decision while her petition was pending. The movant cannot prevail on his second asserted claim of ineffective assistance of counsel.

Appendix at 26.

After being denied post-conviction relief, Mr. Ventrice appealed to the Eleventh Circuit, requesting the issuance of a certificate of appealability. Mr. Ventrice claimed in his motion for a COA that his appellate

counsel's failure to file the petition for rehearing below and petition for writ of certiorari in this Court constituted an unjustified waiver of his statutory right to have his case reviewed by this Court. The Eleventh Circuit held Mr. Ventrice's habeas claims above did not rise to a denial of a constitutional right. The instant petition followed.

REASONS FOR GRANTING THE PETITION

The Petitioner, Mr. Ventrice, respectfully submits the Eleventh Circuit's holding that a defendant's appellate attorney's failure to file a petition for rehearing below and an appeal in this Court, after being instructed and agreeing to do so, does not rise to a level of a denial of a constitutional right was wrongly decided as well as contrary to prior decisions of this Court.

As stated above, in his section 2255 motion, Mr. Ventrice maintained he received ineffective assistance of counsel, in that his appellate counsel failed to file the

petition for rehearing in the appellate court below as well as subsequently file the petition for writ of certiorari in this Court, after being instructed and agreeing to do so in the first instance. According to Mr. Ventrice, had his appellate counsel filed the petitions aforementioned, he would have pursued his preserved *Apprendi* based claims.

In order to establish a Sixth Amendment violation based on counsel's failure to appeal, this Court held a defendant must show that (1) counsel was ineffective and (2) but for counsel's ineffectiveness, an appeal would have been filed. *Roe v. Flores-Ortega*, 528 U.S. 470, 120 S.Ct. 1029 (2000). If an attorney has consulted with his client about an appeal, he will not be found ineffective unless he fails to follow "express instructions with respect to an appeal." *Id.* at 478. Following the decision in *Flores-Ortega*, federal courts have held that "[a]n attorney's failure to file a notice of appeal after being instructed to do so by his client constitutes ineffective assistance entitling the movant to § 2255

relief." *Evans v. United States*, 2006 U.S. Dist. LEXIS 49516, 2006 WL 1300672 at *5 (E.D. Mo. May 8, 2006). "No inquiry into prejudice or likely success on appeal is necessary." *Id.* (citing, *Holloway v. United States*, 960 F.2d 1348, 1356-57 (8th Cir. 1992)). The Ninth Circuit aptly stated: "the prejudice in failure to file a notice of appeal cases is that the defendant lost his chance to file the appeal, not that he lost a favorable result that he would have obtained by appeal." *United States v. Sandoval-Lopez*, 409 F.3d 1193, 1197 (9th Cir. 2005). The appropriate remedy for such failure is to re-sentence the habeas petitioner, "thus affording the [Movant] an opportunity to take a timely direct appeal." *Barger v. United States*, 204 F.3d 1180, 1182 (8th Cir. 2000)(citations omitted).

Having said that, once the district court denies a petitioner habeas relief under § 2255, he can seek appellate review of the district court's order only after the issuance of a COA by the district or appellate court. *See, 28 U.S.C.A. § 2253(c)(2)* (West 2003); *Miller-El v.*

Cockrell, 537 U.S. 322, 336 (2003)("Until a COA has been issued federal court of appeals lack jurisdiction to rule on the merits of appeals from habeas petitioners."). "When a habeas applicant seeks permission to initiate appellate review of the dismissal of his petition, the court of appeals should limit its examination to a threshold inquiry into the underlying merit of his claims." *Miller-El*, 537 U.S. at 327. "This threshold inquiry does not require full consideration of the factual or legal bases adduced in support of the claims. In fact the statute forbids it." *Id.* at 336.

A COA will be granted if the petitioner makes "a substantial showing of the denial of a constitutional right." *28 U.S.C.A. § 2253 (c)(2)*. "A petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El*, 537 U.S. at 327. "The question is the debatability of the underlying

constitutional claim, not the resolution of that debate." *Id.*, at 342. "Indeed, a claim can be debatable even though every jurist might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail." *Id.*, at 338.

With this clearly established legal background, Mr. Ventrice moved the district and appellate court below for a COA based on the denial of a constitutional right -- the right to effective assistance of counsel on appeal. Specifically, Mr. Ventrice claimed his counsel's failure to file the petition for rehearing in the appellate court below as well as the petition for writ of certiorari in this Court constituted an unjustified waiver of his statutory right to have (1) the Eleventh Circuit to reconsider its panel's opinion affirming his sentence imposed by the district court below, and (2) this Court review the Eleventh Circuit's opinion affirming the district court's judgment below. The Eleventh Circuit held Mr. Ventrice failed to show a denial of a constitutional right; that is, simply put, appellate

counsel's failure to file the petition for rehearing before the Eleventh Circuit as well as the petition for writ of certiorari in this Court, errors and omissions occurring on direct appeal, notwithstanding appellate counsel told Mr. Ventrice the petitions would be filed, did not rise to a level of a denial of a constitutional right. Mr. Ventrice respectfully submits such a legal conclusion rendered by the Eleventh Circuit here conflicts with prior opinions of this Court as well as other federal courts faced with the same issues raised in the instant case.

The starting point for consideration of whether there was a denial of constitutional right given the facts of this case is *Jones v. Barnes*, 463 U.S. 745, 751, 103 S.Ct. 3308, 3312 (1983)("the accused has the ultimate authority to make certain fundamental decisions regarding the case, as to whether to ... take an appeal."); *see also*, *Boykin v. Alabama*, 395 U.S. 238, 242-43, 89 S.Ct. 1709, 1711-12 (1969); *Johnson v. Zerbst*, 304 U.S. 458, 464-65 (1938). "The most basic rights of criminal defendants are subject to waiver." *In Re Reed*, 161 F.3d

1311, 1316 (11th Cir. 1998). So, it should be beyond peradventure that for Mr. Ventrice to have waived his statutory rights to direct appeal, which includes his statutory right to seek a rehearing before the Eleventh Circuit as well as final review of the Eleventh Circuit's judgment by this Court, he must have done so voluntarily, knowingly, or intelligently, *i.e.*, with a full comprehension check. Given the undisputed record below, Mr. Ventrice was told by his appellate counsel a petition for rehearing would be filed before the extension of time granted by the Eleventh Circuit to file same would expire. Thereafter, appellate counsel failed to do so! Mr. Ventrice was assured by appellate counsel the petition for writ of certiorari would be timely filed in this Court. It was not! The reason was not because appellate counsel opined such efforts in her judgment would be frivolous. On the contrary, given the holding in *Apprendi*, the split amongst the federal courts in the reach of *Apprendi*, and granting of certiorari and subsequent briefing in *Blakley*, Mr. Ventrice's appellate

counsel opined the filing of a petition for rehearing in the appellate court below and a petition for certiorari in this Court were meritorious. Neither was done due to some claimed personal problems experienced by appellate counsel at the time. In sum, Mr. Ventrice's appellate counsel dropped the ball not once but twice, all to the detriment of her client, Mr. Ventrice.

Had Mr. Ventrice's § 2255 habeas petition below been before other federal courts or the Florida Supreme Court, he would have obtained not only a COA on the issues below, but reinstatement of his direct appeal rights to the appellate court below and this Court. *See, Martinez v. United States*, 2006 U.S. Dist. LEXIS 45211 (Dist. S.D. - decided July 3, 2006)("failure to follow the procedure resulted in Movant's loss of the opportunity to petition for certiorari.... the Court will ask the Eighth Circuit to vacate and reenter its Mandate in this matter, and appoint new counsel to file a petition for certiorari ..."); *Cox v. United States*, 294 F.3d 959, 960 (8th Cir. 2002)(found that counsel failed to file a petition for

certiorari as promised, vacated its judgment affirming *Cox's* conviction and entered a new judgment in order to allow timely filing of the petition); *Steele v. Kehoe*, 747 So.2d 931, 934 (Fla. 1999).

The constitutional deprivation here is clear -- Mr. Ventrice lost his statutory right to petition the Eleventh Circuit for a rehearing on the panel's opinion as well as request this Court to review the Eleventh Circuit's opinion rejecting his preserved *Apprendi/Blakely* based claims, all due to his appellate counsel's failure to file same. Federal courts have emphasized that a defendant's actual "request" is still a critical element in the Sixth Amendment analysis. The Constitution does not require lawyers to advise their clients of the right to appeal. Rather, the Constitution is only implicated when a defendant actually requests an appeal, and his counsel disregards the request. *Morales v. United States*, 143 F.3d 94, 97 (2nd Cir. 1998).

The facts in the instant case are no different than *Cox*, *supra*. There, the Eighth Circuit held that where an appellate attorney promises to file a petition for writ of certiorari in this Court after the appellate court affirms a defendant's conviction and sentence on direct appeal, and fails to do so, the defendant's Sixth Amendment right is implicated. The Eighth Circuit determined that proper remedy in *Cox* was for the appellate court to vacate its judgment affirming *Cox's* conviction, and enter a new judgment in order to allow timely filing of the petition. 294 F.3d at 960.

In *Perez v. Dept. of Corrections*, 227 F.Supp.2d 1298 (S.D. Fla. 2002), the court determined appellate counsel rendered ineffective assistance of counsel due to his failure to keep a case alive in the appeal pipeline. In so doing, the court held:

> To ensure that appellate counsel keeps a direct appeal alive, the law requires counsel (1) to consult with the defendant "when there is reason to think ... that a rational

defendant would want to appeal (for example, because there are non-frivolous grounds for appeal)," *Roe*, 528 U.S. at 480, 120 S.Ct. 1029, and (2) to follow a defendant's instruction in that regard. *Pequero v. United States*, 526 U.S. 23, 28 (1999)("when counsel fails to file a requested appeal, a defendant is entitled to [a new] appeal without showing that his appeal would likely have merit.").

Under certain circumstances, counsel's duty to keep a case alive extends to discretionary appeals, when the defendant is reasonably relying on a state-appointed public defender to file his appeal. In *Pressley v. Wainwright*, 540 F.2d 818 (5th Cir. 1976), the defendant asked court-appointed counsel ... to seek discretionary review in the Florida Supreme Court ... The request was favorably received by counsel. The defendant relied on this response. Yet counsel failed to file the appeal within the deadline. *See, id.*, 540 F.2d at 819-21 & n.5. Thus, the Court held that counsel's "failure to act" frustrated the prisoner's right to petition in the Florida Supreme Court, and affirmed a habeas order requiring the State of Florida either to allow a belated application to its Supreme Court, or to grant a new trial. *Id.* at 820-21 & n.2.

Perez, 227 F.Supp.2d at 1306-07.

To the extent Mr. Ventrice was required to show a form of prejudice flowing from appellate counsel's deficient performance on direct appeal in the habeas court below, he noted in his application for a COA a federal criminal appeal which mirrored his case procedurally. *See*, *United States v. Mohammed*, 135 Fed. Appx. 363, 364, 2005 U.S. App. LEXIS 11577 (11th Cir.)(decided June 16, 2005). In *Mohammed*, the defendant preserved his *Apprendi* based claims at sentencing before the district court. On appeal, the Eleventh Circuit affirmed the district court's judgment. Mr. Mohammed then filed a pro se petition for rehearing which was denied. Mr. Mohammed then filed a petition for writ of certiorari in this Court, renewing his *Apprendi* based claims. This Court granted the petition, vacated the judgment of the Eleventh Circuit and remanded the case for further consideration of this Court's decision in *Blakely/Booker*. On remand, the

Eleventh Circuit vacated Mr. Mohammed's sentence and remanded the case for resentencing in accordance with *Booker/Blakely*. *Mohammed*, 135 Fed. Appx. at 365.

Here, the district court below, applying *Apprendi*, sentenced Mr. Ventrice to a lesser sentence at his original sentencing hearing. In other terms, the record is clear that Mr. Ventrice would have been sentenced to a 10-months imprisonment had the district court been given an opportunity to re-sentence him in accordance with this Court's holdings in *Apprendi/Blakely/Booker*. Having shown other federal and state courts would have granted Mr. Ventrice's application for a COA as well as reinstatement of his statutory rights on direct appeal in the instant case, Mr. Ventrice respectfully submits this Court should vacate the judgment of the Eleventh Circuit below, and direct that a COA issue in order that the appellate record can be fully developed for further review by the Eleventh Circuit and this Court.

* * * * * *

CONCLUSION

WHEREFORE, the Petitioner, CHRISTOPHER VENTRICE, requests this Court to grant the instant petition for writ of certiorari, vacate the judgment of the Eleventh Circuit, and remand the case with instructions to direct the Eleventh Circuit to issue a Certificate of Appealability. Mr. Ventrice requests other and further relief this Court deems proper and just.

Respectfully submitted,

CHRISTOPHER VENTRICE
2680 301 South
Jesup, GA 31599

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 06-13169-C

CHRISTOPHER VENTRICE,

Petitioner-Appellant

versus

UNITED STATES OF AMERICA

Respondent-Appellee.

Appeal from the United States District Court for the Southern District of Florida

---

(FEBRUARY 22, 2007)

Before **DUBINA and CARNES, Circuit Judges.**

BY THE COURT:

Appellant has filed a motion for reconsideration of this Court's order dated January 17, 2007, denying appellant's motion for a certificate of appealability ("COA") and "Motion for Order Withdrawing Attorney Benson Weintraub as Counsel for Appellant." Upon reconsideration, appellant's motion for a COA is DENIED because he failed to make a substantial showing of the denial of a constitutional right. See 28 U.S.C. § 2253(c)(2); Slack v. McDaniel, 529 U.S. 473, 484, 120 S.Ct. 1595, 1604, 146 L.Ed.2d 542 (2000); Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984); Herring v. Sec'y, Dep't of Corr., 397 F.3d 1338, 1357 (11th Cir. 2005). Appellant's "Motion for Order Withdrawing Attorney Benson Weintraub as Counsel for Appellant" is DENIED AS UNNECESSARY.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 06-13169-C

CHRISTOPHER VENTRICE,

Petitioner-Appellant

versus

UNITED STATES OF AMERICA

Respondent-Appellee.

Appeal from the United States District Court for the Southern District of Florida

---

(JANUARY 17, 2007)

ORDER:

Appellant's motion for a certificate of appealability is DENIED because appellant has failed to make a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2).

Appellant's "Motion for Order Withdrawing Benson Weintraub as Counsel for Appellant" is DENIED AS UNNECESSARY.

/s/ Joel F. Dubina
UNITED STATES CIRCUIT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CHRISTOPHER VENTRICE
Petitioner,

vs. CASE NO. 05-60927-CV-GONZALEZ
99-6182-CR-GONZALEZ

UNITED STATES OF AMERICA
Defendant.

ORDER

This matter comes before the Court upon Petitioner's Motion to vacate sentence (DE #1) and Motion for an Evidentiary Hearing dated December 13, 2005 (DE# 11).

The Motion for an Evidentiary Hearing was filed two days before Judge Snow filed her Report and Recommendation (DE# 12) on December 15, 2005. Thereafter on January 10, 2006 (DE# 14) the Petitioner

filed his objections to the Report and Recommendation of the Magistrate Judge. The Motion for an Evidentiary Hearing was referred to Judge Snow (DE #15) and denied (DE #16).

This matter is now before the Court on the Magistrate's Report and Recommendations and Petitioner's Objections thereto. The Court has reviewed the Motion and the record, and being otherwise duly advised, it is hereby

ORDERED and **ADJUDGED** that

1. The Defendant's objections (DE # 14) are hereby OVERRULED

2. The Court, after de novo review, adopts in full Magistrate Judge Lurana Snow's Report and Recommendation

3. This case is **CLOSED**.

DONE AND ORDERED in Chambers at Fort Lauderdale, Florida, this 16 day of May 2006.

/s/ Jose A. Gonzalez, Jr.
JOSE A. GONZALEZ, JR.
UNITED STATES DISTRICT JUDGE

cc: Hon. Lurana S. Snow
Donald Chase, AUSA
Benson Weintraub, Esquire

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CHRISTOPHER VENTRICE
Petitioner,

vs. CASE NO. 05-60927-CV-GONZALEZ
99-6182-CR-GONZALEZ

UNITED STATES OF AMERICA
Defendant.

ORDER

THIS MATTER has come before the court upon the notice of appeal (DE #19, 20, 23) of Movant Christopher Ventrice from this Court's Order of May 17, 2006, denying Movant's 28 U.S.C. § 2255 Motion for writ of habeas corpus. "District courts must treat notices of appeal filed by petitioners following a denial of . . . a section 2255 petition as applications for [a certificate of appealability]." Edwards v. United States, 114 F.3d

1083, 1084 (11th Cir. 1997). The Court therefore construes Petitioner's notice of appeal as an application for a certificate of appealability. Having reviewed the record in this case, the Court hereby **ORDERS** and **ADJUDGES** that Petitioner's application for certificate of appealability is **DENIED**.

Under 28 U.S.C. §2253 (c) (2), a certificate of appealability may issue only if the movant "has made a substantial showing of the denial of a constitutional right." The Supreme Court has declared that such a demonstration "includes showing that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." Slack v. McDaniel, 529 U.S. 473, 484, 120 S.Ct. 1595 (quoting Barefoot v. Estelle, 463 U.S. 880, 894 (1983)) (internal quotations omitted).

Having reviewed the record in this case, the Court finds that Movant has not and cannot make the requisite showing, and, therefore, a certificate of appealability may not issue. Movant's motion is therefore **DENIED.**

DONE AND ORDERED in Chambers at Fort Lauderdale, Florida, this 10th day of July 2006.

/s/ Jose A. Gonzalez, Jr.
JOSE A. GONZALEZ, JR.
UNITED STATES DISTRICT JUDGE

cc: Counsel

APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 05-60927-CIV-GONZALEZ/SNOW
99-6182-CR-GONZALEZ/SNOW

CHRISTOPHER VENTRICE
Petitioner,

vs.

UNITED STATES OF AMERICA
Defendant.

REPORT AND RECOMMENDATION

THIS CAUSE is before the Court on the movant's Motion to Vacate, Set Aside, or Correct Sentence filed pursuant to 28 U.S.C. § 2255, which was referred to United States Magistrate Judge, Lurana S. Snow, for report and recommendation.

I. PROCEDURAL HISTORY

On August 17, 1999, the movant and two co-defendants were charged by indictment with conspiracy to possess with intent to distribute cocaine, in violation of 21 U.S.C. § 846 (Count 1), and using and carrying firearms during and in relation to a drug trafficking crime, in violation of 18 U.S.C. § 924(c) (Count 2). A superseding indictment was returned on January 27, 2000, which added a count against one of the movant's co-defendants. The movant proceeded to trial on April 17, 2000, and on April 25, 2000, the jury found him guilty of both counts charged in the superseding indictment.

On December 14, 2000, the movant was sentenced to ten months imprisonment on Count 1, and a consecutive sixty month prison term on Count 2. The movant appealed his conviction and the Government filed a cross-appeal pertaining to the sentence imposed. On October 18, 2002, the Eleventh Circuit Court of

Appeals affirmed the movant's conviction, but reversed his sentence, holding that Apprendi v. New Jersey, 530 U.S. 466 (2000) did not apply to the movant's case. Accordingly, the case was remanded to the district court for re-sentencing.

At the re-sentencing hearing, the movant argued that the Government had not proved the drug quantity beyond a reasonable doubt at trial and, alternatively, had not established the quantity by a preponderance of the evidence at re-sentencing. The movant also sough downward departures based on sentencing entrapment and minor role in the offense. The trial judge found that the conspiracy of which the movant was convicted involved five to fifteen kilograms of cocaine, and sentenced the movant to a prison term of 121 months on Count 1, followed by a consecutive 60 month term on Count 2.

The movant appealed, and on March 10, 2004, the Eleventh Circuit affirmed the judgment on the

district court. The United States Supreme Court denied *certiorari* on February 28, 2005. The instant motion to vacate, set aside or correct sentence pursuant to 28 U.S.C. Section 2255 was timely filed on June 8, 2005. The movant asserts two grounds for relief: (1) he was denied his right to effective assistance of counsel at trial and on his first appeal because his lawyer was laboring under a conflict of interest, (2) his second appellate counsel was ineffective for failing to "keep the case alive" long enough for movant to benefit from the holding of United States v. Booker, 125 S. Ct. 783 (2005) and (3) he received ineffective assistance of counsel at sentencing based on his lawyer's failure to seek a reduction for mitigating role.

II. RECOMMENDATION OF LAW

The standards which must be applied in determining what constitutes ineffective assistance of counsel are set forth in Strickland v. Washington, 466 U.S. 668 (1984). There the court held that "the proper

standard of attorney performance is that of reasonably effective assistance," and that the burden is on the defendant to demonstrate that "counsel's representation fell below an objective standard of reasonableness." Id. At 687-688. In determining whether the defendant has met this burden,

> . . . a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance.

The court in Strickland noted that counsel in any criminal case has certain basic duties: a duty of loyalty, to avoid conflicts of interest; a duty to advocate decisions and keep him informed of important

developments in the case; and a duty to apply "such skill and knowledge as will render the trial a reliable adversarial testing process." Id. at 688. In determining whether counsel in a particular case adequately performed these duties, the reviewing court must make every effort to "eliminate the distorting effects of hindsight . . . and to evaluate the conduct from counsel's perspective at the time," and the court should apply "a heavy measure of deference to counsel's judgments." Id. at 689, 691.

The "burden of proof for showing ineffective assistance of counsel, is and remains, on petitioner throughout a habeas corpus proceeding." Roberts v. Wainwright, 666 F.2d 517, 519 n.3 (11th Cir. 1982). See also, Jones v. Kemp, 678 F.2d 929, 932 (11th Cir 1982). The petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland v. Washington, supra, at 694.

A. Conflict of Interest

The movant first contends that he was denied his right to effective assistance of counsel because Fred Haddad, Esq., who represented movant at trial, during his first appeal and at re-sentencing also represented an individual who was a potential witness against the movant at trial.

In order to demonstrate a Sixth Amendment violation based on attorney conflict of interest, the movant must establish that "(1) an actual conflict of interest (2) adversely affected his lawyer's performance." Cuyler v. Sullivan, 446 U.S. 335, 350 (1980). The Eleventh Circuit has held that an actual conflict of interest occurs when a lawyer has "inconsistent interests." Smith v. White, 815 F.2d 1401, 1405 (11th Cir. 1987). Where the alleged conflict entails prior representation of a testifying witness, a petitioner must "show that either (1) counsel's earlier representation of the witness was substantially and

particularly related to counsel's later representation of [petitioner] or (2) counsel actually learned particular confidential information during the prior representation of the witness that was relevant to [petitioner's] case." Id.

The movant also must show that the alleged actual conflict of interest adversely affected his counsel's performance by proving three elements:

> First he must point to "some plausible alternative defense strategy [that] might have been pursued." Second, he demonstrate that the alternative strategy or tactic was reasonable under the facts . . . . Finally, he must show some link between the actual conflict and the decision to forego the alternative strategy of defense.

Freund v. Butterworth, 165 F.3d 839, 860 (11th Cir. 1999) (*en banc*) (citation omitted).

It is important to note that the holding of Cuyler v. Sullivan, supra, does not apply to potential conflicts

of interest, since "the possibility of conflict is insufficient to impugn a criminal conviction." Cuyler, 446 U.S. at 350. In the instant case, the movant asserts that during his trial he learned for the first time that an individual named Kenneth Mitchell was listed in discovery materials as a potential witness to prior similar acts under Rule 404(b) of the Federal Rules of Evidence. The movant contends that his lawyer, Fred Haddad, had an actual conflict of interest because he represented Mitchell on federal supervised release violation in the Middle District of Florida. The docket sheet in the Middle District case reflects that Mr. Haddad filed his notice of appearance on behalf of Mitchell on June 15, 2000, nearly two months after the conclusion of the movant's trial, but prior to his sentencing and appeal. (Memorandum, DE 2, Exhibit 3.) The Government's response reflects that Mr. Haddad also represented Mitchell in a Broward County marijuana case which concluded on January 5, 2000.

(Response, DE 7, Exhibit B.) Mitchell was never called as a witness against the movant in any proceeding.

The movant complains that Mr. Haddad never told him that Mitchell was a potential witness against him and the Government never requested a Garcia hearing. According to the Government's response to the instant motion, this is because the prosecutor advised Mr. Haddad that he would not be calling Mitchell as a witness and, in the prosecutor's opinion, Mr. Haddad did not have a conflict of interest in the movant's case. Regardless of the reason, the fact remains that Mitchell never testified against the movant and Mr. Haddad was not placed in the position of cross examining him in the course of his representation of the Movant.

The movant has made no showing that his lawyer had "inconsistent interests" by virtue of his representation of Mitchell in unrelated proceedings in Broward County and in the Middle District of Florida. At best, the movant has shown a potential conflict of

interest which was eliminated by the prosecutor's decision not to call Mitchell as a witness, thereby removing the possibility that Mr. Haddad would be required to cross-examine him. Under these circumstances, Mr. Haddad's hypothetical conflict of interest did not rise to the level of an actual conflict. Freund, 165 F.3d at 865.

Even if the movant could demonstrate an actual conflict of interest, he has made no showing whatsoever that Mr. Haddad's performance was adversely affected. He has cited no plausible alternative defense strategy, reasonable under the facts of his case, which Mr. Haddad decided to forgo as the result of his representation of Mitchell. Id. at 860, 866-69. Therefore, the movant is not entitled to §2255 relief on the ground of attorney conflict of interest.

B. Ineffective Assistance of Counsel on Second Appeal

The movant also argues that he was denied his right to effective assistance of counsel on his appeal after re-sentencing, when he was represented by Rhonda Anderson, Esquire. The law is clear that defendants in criminal cases have the right to effective counsel on appeal. In order to prevail on this ground, a habeas corpus petitioner must prove that he did not receive "reasonably effective representation." Mylar v. Alabama, 671 F.2d 1299, 1300 (11th Cir. 1982). However, counsel need not provide perfect assistance. Id.

In her brief on appeal, Ms. Anderson raised three issues: (1) whether the district court erred in failing to make individualized finding concerning the scope of the movant's criminal activity when the court found that the quantity of cocaine involved in the conspiracy was between five and fifteen kilograms, (2) whether the court erred in finding that the movant did not qualify for

a decrease in his offense level for his mitigating role and (3) whether the Sentencing Guidelines are statutes requiring a fact-finding standard of proof beyond a reasonable doubt. Following the Eleventh Circuit's March 10, 2004, affirmance of the district court's judgment, Ms. Anderson received an extension of time within which to seek rehearing and rehearing *en banc*. However, instead of filing a petition for rehearing, Ms. Anderson filed a Motion to Recall Mandates for Reinstatement of Original Sentences Imposed.[1]

The Eleventh Circuit denied this Motion on January 31, 2005. Ms Anderson then filed a petition for writ of *certiorari* for review of this decision, which was denied by the Supreme Court. A petition for rehearing likewise was denied by the Supreme Court on April 18, 2005.

The movant argues that Ms. Anderson's failure to file a petition for rehearing and rehearing *en banc*

[1] Mandate had issued on April 21, 2004.

rendered United States v. Booker, 125 S.Ct. 738 (2005) inapplicable to his case, since the decision applied only to cases pending on direct review. According to the movant, Ms. Anderson was remiss in failing to keep his case in the appellate pipeline long enough to benefit from Booker.

As the Government points out in its response, United States Supreme Court did not grant *certiorari* in Booker until August 2, 2004. The movant has not provided the date set forth in the extension of the time granted by the Eleventh Circuit within which to file a petition for rehearing or rehearing *en banc*. The undersigned infers from this omission that Ms. Anderson required to file her petition prior to August 2, 2004.[2] Instead, she filed a motion to Recall Mandates on September 8, 2003, after *certiorari* was granted in Booker.

---

[2] Orders issued by the appellate court are reflected in the district court file. The movant states only that the motion for extension of time was filed and granted on March 25, 2003. [sic] (Movant's Memorandum, DE 2 at 8.)

The movant asks this Court to speculate that a petition for rehearing would have kept his case in the appellate pipeline long enough for Booker to apply, and hold Ms. Anderson responsible for failing to correctly predict what the Supreme Court would do months after the movant's conviction and sentence were affirmed. The case on which the movant relies, Perez v. Department of Corrections, 227 F.Supp. 2d 1298 (S.D.Fla. 2002) involved no such speculation. In Perez, appellate counsel failed to apprise a Florida District Court of Appeal that the pivotal question in the case (whether the crime of attempted felony murder exists) already had been certified to the Florida Supreme Court, and failed to seek rehearing when the Court of Appeal resolved that issue against his client. United States District Judge Donald Graham held that in light of the Florida Supreme Court's subsequent holding that the crime of attempted felony murder did not exist, these omissions rose to the level of ineffective assistance of counsel.

The movant contends that Perez is analogous to his own case because the United States Supreme Court had granted *certiorari* in Blakely v. Washington, 542 U.S. 296 (2004) prior to the Eleventh Circuit's decision affirming his conviction. However, Blakely did not involve the federal Sentencing Guidelines, and afforded the movant no basis for relief after it was decided, let alone while it was pending review. The fact that the Supreme Court's even later decision in Booker was foreshadowed by prior cases does not mean that the Booker holding was inevitable.

Simply stated, the movant's argument "proves too much." Appellate lawyers cannot be held responsible for predicting landmark decisions and should not be encouraged to file petitions for review for the purpose of "buying time." Ms. Anderson was not required to file a petition for rehearing after the Eleventh Circuit had rejected the movant's sentencing arguments for the second time, based on the possibility that the

United States Supreme Court might generate a helpful decision while her petition was pending. The movant cannot prevail on his second asserted claim of ineffective assistance of counsel.

C. Failure to Seek Mitigating Role at Sentencing

Finally, the movant argues that he was denied his right to effective assistance of counsel at sentencing because Mr. Haddad failed to seek a reduction in the movant's offense level based on mitigating role in the offense. This argument is frivolous. Mr. Haddad did seek a reduction based on mitigating role. (Transcript of Re-Sentencing Hearing, DE 229 at 8-9.) Moreover, as the movant himself points out, this issue was raised by Ms. Anderson on direct appeal. (Movant's Memorandum, DE 2 at 8.) Accordingly, the movant has failed to present any ground which entitles him to § 2255 relief.

III. CONCLUSION

This Court has reviewed carefully the record in this matter as well as the applicable law, and being fully advised in the premises, it is hereby

RECOMMENDED that the Motion to Vacate, Set Aside, or Correct Sentence be DENIED.

The parties will have ten days from the date of being served with a copy of this Report and Recommendation within which to file written objections, if any, with the Honorable Jose A. Gonzalez, Jr., Senior United States District Judge. Failure to file objections timely shall bar the parties from attaching on appeal factual findings contained herein. LoConte v. Dugger, 847 F.2d 745 (11th Cir. 1998), cert. denied, 488 U.S. 958 (1988); RTC v. Hallmark Builders, Inc., 996 F.2d 1144, 1149 (11th Cir. 1993).

DONE AND SUBMITTED at Fort Lauderdale, Florida, this 15th day of December, 2005.

/s/ Lurana S. Snow
LURANA S. SNOW
UNITED STATES DISTRICT JUDGE

Copes to:

AUSA Don Chase (FTL)
Benson Weintraub, Esq.